BOEY OI LENG

v.

TRANS RESOURCES CORPORATION SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[COMPANIES (WINDING-UP) PETITION NO: MT3-28-171-2000]
19 OCTOBER 2001

COMPANY LAW: *Winding-up - Petition - Striking out - Whether a s. 218 petition under Companies Act 1965 could be struck out pursuant to O. 18 r. 19 Rules of the High Court 1980 - Whether High Court has jurisdiction to strike out petition under its inherent powers - Whether petition scandalous, frivolous, vexatious or an abuse of the process of the court - Whether petition could be struck out under s. 221(2)(f) Companies Act 1965*

This was the respondent's application to strike out the petitioner's winding-up petition under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court. The petitioner's petition presented under s. 218(1)(e) of the Companies Act 1965 ('CA') was based on the ground that the respondent was unable to pay its debt after service of a s. 218 notice under same Act.

Held:

[1] Authorities show that O. 18 r. 19 RHC can be applied in an application to strike out a petition presented under s. 218 CA. Also, that the High Court may invoke its inherent jurisdiction to hear and determine an application to strike out a s. 218 petition. (pp 408 f-i & 409 a-i)

[2] A s. 218 petition may only be struck out under O. 18 r. 19(1)(b) RHC if it is scandalous, frivolous or vexatious. The petition herein was grounded upon the default by the respondent to respond to the statutory notice under s. 218 CA and was certainly neither unnecessary nor irrelevant. Also, a petition may be described as frivolous where it is obviously unsustainable, eg, where the petition is *res judicata*, or where the wrong party is being sued, or without merit and unjustified. However, the petitioner did not relate to any of those examples nor other factual circumstances which might be included in the meaning of the word "frivolous" or vexatious". Therefore, there was no merit in that argument. (p 410 d-g)

[3] An illustration of an abuse of the process of the court arises where the intention is to embarrass the defendant. However, the present case involved the pursuit of a claim pursuant to a statutory demand and was not obviously an abuse of the process of the court. It is a statutory right of the petitioner under s. 218(e) CA and it is for the court to determine the merits of the petition. Therefore, that ground failed. (p 410 g-i)

[4] Section 221(2)(f) CA confers incidental powers on the court in giving directions as to the proceedings as the court thinks fit when the petition comes up for hearing. The incidental powers may be exercised so long as no injustice is caused to the respondent. The categories of the directions to be given under s. 221(2)(f) are not closed. In *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd*, it was observed *obiter* that the directions as to the proceedings under s. 221(2)(f) were directions of things to be done before or during the hearing of the petition. The same sentiment was expressed in *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* in which it was said by the learned judge therein that s. 221(2)(f) was only directions as to proceedings and could not be relied upon to strike out a winding-up petition. The court agreed with the reasons given in the aforesaid cases. (p 411 c-i)

[4a] The determination as to the direction to be given by the court is an exercise of a general discretion on the part of the court, based on the factual matrix and circumstances of each individual case. In the present case, the facts of the case would not justify the striking out of the petition herein less so under s. 221(2)(f) CA which could not include such a direction. The direction that the court would give under s. 221(2)(f) was that the petition should be heard on its merits and that was consistent with the justice of the case. (p 412 a-e)

[Application dismissed; petition to be heard on merits pursuant to s. 221(2)(f) CA.]

Case(s) referred to:

Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd [1999] 4 CLJ 135 ***(foll)***

Fairview Schools Bhd. v. Indrani a/p Rajaretnam & Ors. (No. 1) [1998] 1 CLJ 285 ***(foll)***

Ngan Tuck Seng & Anor v. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26 ***(foll)***

Re NKM Holdings Sdn Bhd [1985] 2 MLJ 390 ***(refd)***

Re Tahansan Sdn Bhd v. Tay Bok Choon [1984] 2 CLJ 224; [1984] 1 CLJ (Rep) 383 ***(refd)***

Sari Atlantic Sdn Bhd v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(refd)***

Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 2 MLJ 509 ***(foll)***

Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd [2000] 7 CLJ 320 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), 221(2)(f)
Rules of the High Court 1980, O. 18 r. 19(1)(b)(d)

Other source(s) referred to:
Alex Chang Huey Wah, *Companies Winding-Up*, Handbook, MLJ Handbook Series, 1998, pp 92, 104
Malaysian High Court Practice, MLJ 1998 edn, p 510

For the respondent - Noorzilan Mohamed Noor (Mohd Zaini Marzuki); M/s Khairul Azman, Noorzilan, Nooron & Partners
For the petitioner - R Rajasingam (Wong Rhen Yen); M/s Zainudin Wan Nadzim Chua & Mazlinda

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application

This is the respondent's application by way of summons-in-chambers in encl. (8) for an order that:

1. the petitioner's winding-up petition presented on 1 November 2000 be struck out pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court and/or pursuant to s. 221(2)(f) of the Companies Act 1965;

2. all further proceedings in the petition be forthwith stayed pending final determination of this application; and

3. costs of this application be paid by the petitioner in any event.

The petition was presented under s. 218(1)(e) of the Companies Act 1965, on the ground that the respondent was unable to pay its debt, after serving a s. 218 notice dated 31 July 2000.

Procedural Issues

Order 18 r. 19

Before I proceed to consider this application by the respondent, it is necessary to revisit the pertinent procedural issue pertaining to the relationship between an application under O. 18 r. 19 of the Rules of the High Court 1980 and a petition for winding-up under s. 218 of the Companies Act 1965. The issue may be digested to this: Can O. 18 r. 19 be applied or invoked to strike out a winding-up petition under s. 218? This issue was discussed, *albeit obiter*, in great detail by Abdul Hamid Mohamed J (now JCA) in *Buildcon-Cimaco*

Concrete Sdn Bhd v. Filotek Trading Sdn Bhd [1999] 4 CLJ 135. Different and indeed conflicting judicial views have been expressed in a number of cases, thereby leading Abdul Hamid Mohamed J (now JCA) to the observation that "The law is in a rather confused state on this point." His Lordship at p. 144 *ibid*, summarised the various views as follows:

> (a) RHC 1980 are not applicable to a section 218 winding-up petition – *Lai Kim Loi v. Dato' Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 (SC), *Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd. & Anor* [1996] 4 CLJ 828 (Kamalanathan Ratnam JC as he then was).
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> (b) RHC 1980 are not applicable to a section 218 winding-up petition where there are parallel provisions in the Companies (Winding-up) Rules 1972 but applicable where the latter are silent – *Fairview Schools Bhd. v. Indrani a/p Rajaretnam & Ors. (No. 1)* [1998] 1 CLJ 285 (CA).
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> (c) Order 18 rule 19 of the RHC 1980 is not applicable to a section 218 winding-up petition – *Re Lo Siong Fong* [1994] 2 MLJ 72 (VC George J, as he then was), *Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd. & Anor* [1996] 4 CLJ 828 (Kamalanathan Ratnam JC as he then was)
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> (d) Order 18 rule 19 is applicable to a section 218 winding-up petition – *N.K.M Development Sdn. Bhd. v. Irex Sdn. Bhd.* [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56 (VC George J, as he then was), *Ansa Teknik (M) Sdn. Bhd. v. Cygal Sdn. Bhd.* [1989] 2 MLJ 423 (LC Vohrah J);
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> (e) Order 18 rule 19 of the RHC 1980 was applied to a section 218 winding-up petition though it is not known whether the issue of applicability was argued – *Si & Si Sdn. Bhd. v. Hazrabina Sdn. Bhd.* [1996] 3 CLJ 657 (SC).

Having carefully considered the weight of authorities, Abdul Hamid Mohamed, J (now JCA) thought he was bound by the judgments of the Supreme Court in *Si & Si Sdn. Bhd., supra,* and the Court of Appeal in *Fairview Schools, supra,* to the effect that O. 18 r. 19 is applicable to a s. 218 winding-up petition. I am also similarly bound and therefore follow the view that O. 18 r. 19 can be applied or invoked in an application to strike out a s. 218 petition. In *Sri Binaraya Sdn. Bhd. v. Golden Approach Sdn. Bhd.* [2000] 7 CLJ 320 Chin Fook Yen, J arrived at the same conclusion ie, the provisions of O. 18 r. 19(1)(d) can be relied upon in an application to strike out a s. 218 petition.

Inherent Jurisdiction

In *Buildcon-Cimaco, supra* Abdul Hamid Mohamed, J (now JCA) also touched on the question as to whether the court has the inherent jurisdiction to strike out a s. 218 petition and held that he was bound by the decision of the Supreme Court in *Si & Si Sdn. Bhd. v. Hazrabina Sdn. Bhd.* [1996] 3 CLJ 657 that the High Courts have jurisdiction to strike out a winding-up petition under its inherent powers, even though the source was not stated there. The learned judge referred to some of the relevant cases on the issue as follows:

In *N.K.M Development Sdn. Bhd v. Irex Sdn. Bhd.* [1988] 1 CLJ 65, the application was made both under O. 18 r. 19 RHC 1980 and under "the inherent jurisdiction of the court." No specific view was expressed by the learned judge on the inherent jurisdiction of the court.

In *Re Lo Siong Fong* [1994] 2 MLJ 72, the same learned judge while holding that O. 18 r. 19 of the RHC 1980 could not be resorted to to strike out a winding-up petition, held that the court had the inherent jurisdiction to strike out any abuse of its process. Unfortunately, no reason was advanced regarding the power of the court to resort to its inherent jurisdiction in a winding-up petition.

In *Si & Si Sdn. Bhd. v. Hazrabina Sdn. Bhd.* [1996] 3 CLJ 657 Dzaiddin SCJ, delivering the judgment of the court said:

> In our view, it is not within the contemplation of O. 18 r. 19(1) of the RHC 1980 to grant damages to the successful applicant, in addition to its powers under the Rule or under its inherent jurisdiction.

As has been said earlier, that case was decided on the assumption that the provisions of O. 18 r. 19 of the RHC 1980 and the inherent jurisdiction of the court may be resorted to in a winding-up, petition, but damages was not allowed as it was outside the contemplation of the provision of that rule or the inherent jurisdiction of the court.

The first time (as far as I know) that the question whether the court may exercise its inherent powers to strike out a winding-up petition was discussed at length was in the case of *Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd. & Anor*. [1996] 4 CLJ 828. In that case Kamalanathan Ratnam JC (as he then was) held that, as RHC 1980 had no place in a s. 218 petition, he was unable to rely on O. 92 r. 4 of the RHC 1980 to hold that the court had inherent jurisdiction to strike out the petition.

In *Ngan Tuck Seng & Anor v. Ngan Yin Groundnut Factory Sdn Bhd* [1999] 3 CLJ 26, also referred to by His Lordship, it was held by Clement Skinner, JC (now J) that the court has the inherent jurisdiction to hear and determine an application to strike out a petition "on the ground that it was an abuse of the process of the court under the inherent jurisdiction of the court."

In *Sri Binaraya Sdn Bhd, supra,* Chin Fook Yen, J (as he then was) held that the inherent jurisdiction of the court "will certainly apply to strike out petition for abuse of the process of the court."

On the basis of the aforesaid cases, it is abundantly clear that our High Courts may invoke its inherent jurisdiction to hear and determine an application to strike out a s. 218 petition, as in the instant case.

Submission For Respondent

It was submitted by En. Noorzilan Md Noor and Encik Mohd Zaini learned counsel for the respondent, that the petitioner is not entitled to present the petition based on the same facts in another petition against Ho Hup Construction Company Bhd in Kuala Lumpur High Court Petition No. D8-28-887-2000. They added that the petitioner has no *locus standi* to present this petition against the respondent.

Petitioner's Case

In relation to encl. (8), En. R. Rajasingam and En. Wong Rhen Yen submitted that the petitioner is not estopped from claiming against the respondent, merely by reason of having presented a winding-up petition against Ho Hup Construction Company Bhd in the Kuala Lumpur High Court, as alluded to above. He added that this is not a plain and obvious case for the petition to be struck out.

Decision Of The Court

A s. 218 petition may only be struck out under O. 18 r. 19(1)(b) if it is scandalous, frivolous or vexatious. The word "scandalous" here means wholly unnecessary or irrelevant (see *Malaysian High Court Practice* MLJ 1998 edn. p. 510). The petition herein is grounded upon the default by the respondent to respond to the statutory notice under s. 218 of the Companies Act 1965 and is certainly neither unnecessary nor irrelevant.

A petition may be described as "frivolous" or "vexatious" where it is obviously unsustainable eg, where the petition is *res judicata*, or where the wrong party is being sued, or without merit and unjustified: see *Malaysian High Court Practice*, *supra*. However, the submission advanced for the petitioner did not relate to any of these examples nor other factual circumstances which may be included in the meaning of the word "frivolous" or "vexatious".

I am therefore of the view that this ground on which the respondent relies is without merit.

The next ground raised for the respondent is that the said petition is otherwise an abuse of the process of the court. An illustration of an abuse of the process of the court arises where the intention is to embarrass the defendant (or in the instant case, the respondent): *Ansa Teknik (M) Sdn. Bhd. v. Cygal Sdn. Bhd.*, *supra*.

However, the instant case involves the pursuit of a claim pursuant to a statutory demand and is obviously not an abuse of the process of the court. It is a statutory right of the petitioner under s. 218(1)(e) and it is for the court to determine the merits of the petition. I therefore hold that this ground contended for the respondent fails.

The next issue for me to decide is whether the petition herein is to be struck out under s. 221(2)(f) of the Companies Act 1965 on which the respondent relies and which where relevant reads as follows:

221 Powers of Court on hearing petition

(1) ...

(2) The Court may on the petition coming on for hearing or at any time on the application of ..., the company, ...

(f) give such directions as to the proceedings as the Court thinks fit.

The ambit of s. 221(2)(f) appears to confer incidental powers on the court in giving directions as to the proceedings as the court thinks fit when the petition comes up for hearing. As a general rule, under s. 221(2), our courts have given direction pertaining to:

1. the dispensation with the advertisement of the notice of intention to appear *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390;

2. allowing the cure of technical errors or the giving of oral evidence in addition to evidence by affidavit: *Re Tahansan Sdn Bhd v. Tay Bok Choon* [1984] 2 CLJ 224; [1984] 1 CLJ (Rep) 383, *Sari Atlantic Sdn Bhd v. AIK Kim Enterprise* [1988] 1 MLJ 201;

3. allowing the petitioners an extension of time to validate an affidavit verifying a petition which was sworn prior to the date of the petition: *Sari Atlantic, supra*.

The incidental powers may be exercised so long as no injustice is caused to the respondent (See also *Companies Winding-Up* Handbook, MLJ Handbook Series, 1998 by Alex Chang Huey Wah, I (177) p. 92 and II (25) p. 104).

These incidental powers of the court are not limited to the aforesaid illustrations and so the categories of the directions to be given under s. 221(2)(f) are not closed. In *Buildcon Cimaco, supra*, Abdul Hamid Mohamed, J (now JCA) observed, *obiter*, that the directions as to the proceedings under s. 221(2)(f), "appear to me to be directions of things to be done before or during the hearing of the petition." The same sentiment was expressed by Chin Fook Yen, J (as he then was) in *Sri Binaraya, supra*, in which the learned judge said that s. 221(2)(f) talked of only giving "directions as to proceedings" and not of relief that the court might grant, and held that s. 221(2)(f) cannot be relied upon to strike out a winding-up petition. I agree with the decision of the learned judges in the aforesaid two cases and the reasons given therein.

The respondent herein is asking the court to give such directions as to the proceedings as the court thinks fit. The determination as to the direction to be given by the court is an exercise of a general discretion on the part of the court, based on the factual matrix and circumstances of each individual case.

In the instant case, the petition alleged that the petitioner had rendered services and completed the works for the respondent in a project known as "Rail Link From South Port to West Port Pulau Indah" – Replacement of Concrete Sleepers and Associated Works and Maintenance, for which the petitioner has on 31 July 2000 served a statutory notice under s. 218 of the Companies Act 1965 demanding for the payment of RM2,215,085.14. The respondent has failed refused and/or neglected to satisfy the demand in the said statutory notice and hence this petition to wind-up the respondent.

It seems crystal clear to me that the aforesaid facts would not justify the striking out of the petition herein, less so under s. 221(2)(f) which cannot include such a direction. The direction which the court would give under s. 221(2)(f) of the Companies Act 1965 is that the petition has to be heard on its merits and this is consistent with the justice of the case. In the circumstances, I dismiss the respondent's application in encl. (8) with costs, but pursuant to s. 221(2)(f), *supra*, I give the direction that the petition herein be heard on its merits.